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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation	)	
Provisions of the	)	
Telecommunications Act of 1996	)	

JOINT REPLY COMMENTS OF EXCEL TELECOMMUNICATIONS, INC. AND TELCO COMMUNICATIONS GROUP, INC.

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SUMMARY

The Commission must set the per-call compensation rate for dial-around calls at a rate lower than the local coin rate. Excel and Telco refute the contentions of the payphone industry that the costs of a coinless call actually exceed the costs of a coin call. In its comments, the payphone industry was merely presenting *post hoc* rationalizations in an attempt to add costs to the Commission's use of a market-based rate.

First, the cost of coin equipment and coin related functions should be directly allocated to coin calls. Coin calls still remain the vast majority of calls made from payphones and those costs are directly related to the process of carrying coin calls. Second, the Commission must ensure that PSPs do not impute the costs of commission payments to location owners into the per-call compensation rate. There is no guarantee that these contracts provide for reasonable rates and the terms of the contracts were not agreed upon by the IXCs. Third, IXCs should not be made to compensate PSPs for the provision of ANI information to IXCs. The PSPs and not the IXCs are the ultimate beneficiary of providing the necessary ANI information.

Moreover, the Commission must reject again the arguments that per-call compensation should be based on 0+ commissions and other market-based surrogates. These surrogates are only higher than the local coin rate, but are not a better indicator of the market. Indeed, these surrogates give the Commission no indication of a market price since 0+ and other commissions involve no competition because of the captive nature of the audience. Moreover, the Commission already has rejected the use of 0+ commissions and other market surrogates as a guideline for measuring the market rate for local coin calls in its *Report and Order* last September.

However, if the Commission decides to establish the rate for coinless payphone calls by

subtracting the cost of coin calls from the deregulated local coin rate, it must set the deregulated coin rate no higher than $.25. In setting the market rate for a local coin call at $.35, the Commission failed to make a reasoned assessment of the market. The sample the Commission used was small and consisted mostly of rural states, which is not representative of the country as a whole. The proceeding before the Massachusetts DPUC regarding NYNEX's payphone rates illustrates that the market rate for local coin calls should be no higher than $.25. Massachusetts is a state more representative than any used in the Commission's sample.

Finally, the Commission should abandon the interim compensation plan. At this late date, attempting to reassess the contributions of all LECs and IXCs would be extremely burdensome and unnecessary. It would be more efficient for the Commission to focus its efforts on developing the appropriate rate for per-call compensation. Indeed, as a matter of law, the Commission is free to abandon the interim compensation plan. However, if the Commission decides to revise an interim compensation plan for the prior year, all LECs and small IXCs must be included. Moreover, carriers who are technically able should be permitted to track and pay interim compensation on a per-call basis.

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EXCEL TELECOMMUNICATIONS, INC.
AND TELCO COMMUNICATIONS GROUP, INC.

Excel Telecommunications, Inc. ("Excel") and Telco Communications Group, Inc., on behalf of its operating subsidiaries ("Telco"), by undersigned counsel and pursuant to the Commission's Public Notice of August 5, 1997, hereby submit their Joint Reply Comments in the above-referenced proceeding.[1]

Excel and Telco refute contentions that the default compensation rate for subscriber 800 and access code calls should *exceed* the Commission's market-based coin call rate. For the reasons provided below, the Commission must reject the *post hoc* rationalizations presented by these commenters as they attempt to add costs to the Commission's use of a market-based default rate. Instead, the Commission should act on the basis of the overwhelming amount of evidence showing -- as the United States Court for the District of Columbia has noted[2] -- that the costs of local coin calls are substantially higher than those for coinless calls, and accordingly set the default rate for subscriber

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[1] FCC Public Notice, DA 97-1673 (August 5, 1997).

[2] *Illinois Public Telecomm. Ass'n,* 117 F.3d 555, 563 (D.C. Cir. 1997) (stating that "IXCs showed that costs of local coin calls are higher because the PSP bears the costs of originating and completing local calls; by contrast, for coinless calls, the PSP only bears the costs of originating the calls").

800 and access code calls at significantly less than a market based local coin rate. In addition, the Commission should consider abandoning any interim compensation plan, but if the Commission decides to maintain some form of interim plan, it should permit carriers who prefer and have the technical ability, to pay compensation during the interim year on a per-call basis.

I. THE COMMISSION MUST REJECT EFFORTS TO INCLUDE EXCESSIVE AND UNNECESSARY COSTS IN CALCULATING THE TOTAL COST OF COINLESS CALLS.

A. The Cost of Coin Equipment and Coin-Related Functions Should Be Directly Allocated to Coin Calls.

If the Commission is going to utilize a market-based approach to setting the default coinless call compensation rate, the Commission must reject the efforts by the RBOC/GTE/SNET Coalition ("Coalition") and the American Public Communications Council ("APCC") to inject excessive coin-related costs into the calculation of a coinless compensation rate. Specifically, the Coalition and APCC contend that "payphones could not be supported unless they [are] capable of handling coin calls,"[3] and therefore they conclude that coin-related costs must be supported by coinless calls as well.[4]

Such an analysis ignores the fact that payphone service providers ("PSPs") already benefit substantially from the significant number of coin calls from payphones. Indeed, despite the PSPs' outrage at their failure until now to receive compensation for coinless calls, coin calls still remain the vast majority of calls made from payphones. According to figures recently released from APCC, 72%

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[3] Comments of the Coalition, at 16 (filed Aug. 26, 1997). Unless noted otherwise, all references to Comments filed by parties are made to the round of comments filed August 26, 1997.

[4] Comments of the Coalition, at 17; Comments of APCC, at 12.

of calls received from the average independent payphone are local and 1+ coin calls.[5] Therefore, the reason that payphones could not be supported unless they are capable of handling coin calls, is that demand for payphones is still generated by the demand for coin calls. It can fairly be said that coin equipment, coin collection, and other coin-related costs are *directly* related to the process of carrying coin calls,[6] and provide PSPs with direct benefits for the placement of such calls. By contrast, the minority of calls from payphones that are subscriber 800 or access code calls do not cause the PSP to incur any further coin-related costs.

Although the payphone industry now argues otherwise -- trying instead to mask these coin-related costs as joint and common -- the Commission should note that these revised arguments contradict the APCC's earlier statement that, "[a]rguably the local coin rate should be ***higher*** than the rate for a [coinless] call because of the usage and coin collection costs typically associated with local coin calling."[7] The Commission should not allow the APCC to now retreat from this statement by attempting to foist excessive coin-related costs onto unrelated coinless calls under the guise of joint and common costs. Section 276 of the Telecommunications Act of 1996 ("1996 Act") simply requires that PSPs "are fairly compensated for each and every completed intrastate and interstate call

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[5] "The Numbers are in . . ., " Perspectives, Aug. 1997 at 35.

[6] AT&T and Sprint, in their Comments, provide prime examples of the coin-related costs to be subtracted from the local coin rate under a market-based approach: (1) costs relating to coin functionality in the telephone, including equipment, maintenance, repair, shipping, staff, and coin collection costs; (2) costs of switching and termination of local calls; and (3) other cost categories that are not properly allocable to compensation for dial-around and subscriber 800 calls including premises owner commission payments. *See* Comments of Sprint, at 9; Comments of AT&T, at 14.

[7] Comments of APCC, at 16, n.15 (filed July 1, 1996).

using their payphone."[8] Excel and Telco submit that PSPs already receive fair compensation for coin-related costs through local coin calls, without any need for recovery of additional costs through coinless call rates. Since coin calls make direct use of coin-related equipment and provide a substantial benefit to PSPs, and since the payphone industry already has admitted that the local coin rate is arguably higher as a result of these costs, coin calls should continue to bear the burden of compensating the PSP for coin-related costs. Notwithstanding the payphone industry's attempts to characterize these costs as joint and common, and to further inflate them through an application of "demand elasticity,"[9] the fact remains that the coin-related costs noted above in footnote six are directly related to the costs of handling coin calls, and PSPs are already fairly compensated for these costs through the local coin rate.

B. IXCs Should Not be Made to Pay for Commission Payments from PSPs to Location Owners.

The Commission's analysis of the default rate must not stop at an analysis of the direct costs incurred by PSPs in providing coin calls and coinless calls respectively. As AT&T and Sprint highlight in their Comments, the Commission must ensure that PSPs do not impute the costs of commission payments to location owners into the per-call compensation rate.[10] Quite simply, there is no guarantee that these contracts provide for reasonable rates, and passing along the costs of such

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[8] 47 U.S.C. § 276(b)(1)(A) (1996).

[9] *See* Comments of the Coalition, at 20-24. The Coalition's analysis of demand elasticity seems to assume that this is a market with "high joint and common costs" in the maintenance of coin-capable payphones. *Id.* at 20. Once these costs are found instead to be related directly to the process of carrying a coin call, the Coalition's effort to further inflate the coinless call rate through a "demand elasticity" analysis must be rejected as well.

[10] Comments of AT&T, at 15; Comments of Sprint, at 9-10.

payments to IXCs through the default compensation rate would be unfair. Imputing such costs into the default compensation rate introduces risks that have not been agreed to by the companies that will pay this compensation. As AT&T summarizes, "the Commission would have to decide what constitutes a reasonable commission rate that would be recoverable by PSPs."[11] Moreover, without proper safeguards, the PSPs would have no incentives to keep commission rates low, since they will be assured of recovering whatever payments they make to location owners by passing the costs along to IXCs. Therefore, in order to avoid a full inquiry into the reasonableness of commission rates and an unchecked rise in the level of commission payments, this Commission should ensure that the costs of commission payments are omitted from the per-call default compensation rate.

C. IXCs Should Not Be Made to Pay for ANI Information Provided by PSPs.

Similarly, the Commission should reject the suggestion by the Coalition that IXCs be made to compensate PSPs for the provision of ANI information to IXCs.[12] The Coalition states, "As Professor Hausman and Arthur Andersen both explain, the cost of meeting this demand is chargeable, and represents an additional cost unique to subscriber 800 and access code calls." *Id.* Arthur Andersen's conclusion seems to be based upon the premise that because PSPs will need to provide ANI information in order to obtain compensation for subscriber 800 and access code calls, the cost of providing this information should be chargeable to IXCs. Similarly, Dr. Hausman concludes that "an additional cost arises if PSPs are required to pay for the delivery of ANI ii coding digits, or other payphone identification information, to be eligible for per-call compensation."[13]

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[11] Comments of AT&T, at 15.

[12] *See* Comments of Coalition, at 7.

[13] Hausman Declaration, at 8-9.

At the simplest level, these conclusions ignore the fact that it is the PSP -- not the IXC -- who will receive the ultimate benefit of providing the necessary ANI information. IXCs can provide subscriber 800 and access code calls without having ANI information programmed into the switch, but PSPs will suffer without compensation as they wait for IXCs to determine which calls were originated at a payphone. If the PSPs want to obtain their compensation in a timely manner, in the plainest terms possible, they must provide the IXCs with the information digits necessary to track those calls. The IXCs are accepting the responsibility placed upon them in the Commission's *Report and Order* and *Reconsideration Order*, in which the Commission ruled that because they benefit from carrying the call, they should bear the burden of paying PSPs for the call.[14] Consistent with this benefit-burden analysis, the Commission should find that if PSPs are to receive the benefit of compensation for dial-around calls from their payphones, the PSPs should at least bear the burden of identifying their payphones to carrier-payors. Indeed, pursuant to the PSPs' rationale, the IXCs should be permitted to subtract the costs they are incurring, in generating tracking and billing systems, from the compensation paid to the PSPs.

II. THE COMMISSION MUST REJECT YET AGAIN THE SPECIOUS ARGUMENTS THAT PER-CALL COMPENSATION SHOULD BE BASED ON 0+ COMMISSIONS AND OTHER "MARKET-BASED SURROGATES."

In its Comments, the APCC reasserts its position that the local coin rate is "at the low end of the range of credible surrogates regarding the market price of a payphone call,"[15] and both the APCC

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[14] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20584, at ¶ 83 (1996) ("*Report and Order*"); Order on Reconsideration, 11 FCC Rcd 21233, 21275, at ¶ 88 (1996) ("*Order on Reconsideration*").

[15] Comments of the APCC, at 7.

and the Coalition urge the Commission to consider utilizing 0+ commission levels or other rates in lieu of the local coin rate.[16] As a preliminary matter, it should be noted that these parties never state clearly why these surrogates are more appropriate than the local coin rate. The only clear point from the arguments made by these parties is that these surrogates are *higher* -- not necessarily better -- than the local coin rate in serving as a baseline for a default coinless compensation rate. Indeed, 0+ and other surrogates are not appropriate indicators of a market based rate because they are devoid of the one factor necessary for setting a market rate--competition. It would be internally inconsistent to utilize commissions negotiated before competition exists as a market-based rate. As Frontier noted in its comments, a major reason why commissions on 0+ traffic are maintained at a high level is because of the captive nature of the audience.[17] For reasons which have been noted repeatedly throughout this proceeding and which do not need to be belabored here, when users need to make payphone calls, they are unlikely to forego the call, especially if there is only one payphone available. Therefore, 0+ commissions are actually *less* likely to be indicative of a market rate than the local coin rate.

As a legal matter, with regard to the Commission's using the local coin rate as a baseline for dial-around compensation, the D.C. Circuit opinion in *Illinois Public Telecomm. Ass'n* did not preclude the Commission from utilizing the local coin rate as a market-based baseline, but only directed the Commission to ensure that if a market-based rate is employed, whatever rate the Commission establishes for coinless calls reflects only coinless call costs.[18] The APCC and the

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16 Comments of the APCC, at 7-10; Comments of the Coalition, at 24-26.

17 Comments of Frontier, at 5.

18 *Illinois Public Telecomm. Ass'n*, 117 F.3d at 563-564.

Coalition present no evidence suggesting why, if the Commission is going to use a market-based approach, the Commission should now set a coinless rate based on monopoly surrogates rather than the local coin rate or another more accurate determination of a market rate minus coin-specific costs. It is interesting that the APCC and the Coalition seem to believe that a market based rate is actually a higher rate than a local coin rate, when the theory behind a free market is that competition would drive prices down.

It should also be noted that the argument for these market-based surrogates has been raised before by these parties, flatly rejected by this Commission, and thus must be rejected here on remand. In its Comments, the APCC quotes the very paragraph in the *Report and Order* in which the Commission rejected the use of 0+ commission levels on the ground that "use of 0+ commission data would tend to overcompensate PSPs . . . ."[19] The APCC cites this paragraph in an effort to now prompt reconsideration of the Commission's rejection of 0+ commission levels as an appropriate surrogate.

The APCC's effort to urge reconsideration comes too late. If the APCC and the Coalition believed so forcefully that the 0+ commission level or other surrogates were superior to the local coin rate, then why is there no record of any challenge to the local coin rate as a baseline for the default coinless call compensation rate in the *Order on Reconsideration?*[20] The record in fact indicates that

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[19] Comments of the APCC, at 8 (*quoting Report and Order*, 11 FCC Rcd at 20577, ¶ 69).

[20] The APCC is cited in the Commission's *Order on Reconsideration* as a party commenting *in defense of* using the local coin rate as "within the range of reasonable cost estimates established on the record." *Order on Reconsideration*, 11 FCC Rcd, at 21254, ¶ 42 (*citing* Comments of the APCC, at 13 (filed July 1, 1996)). The only petitions cited in the *Order on Reconsideration* addressing the compensation amount were filed by AT&T, MCI, PCIA, PageNet, LDDS, Cable & Wireless, AirTouch, Sprint, WPTA, the Inmate Coalition, and Invision. *See Order on*

APCC previously believed that the local coin rate was an approximately correct amount of compensation. Now, however, the APCC and its allies have changed their opinion in light of the D.C. Circuit's ruling that the coin rate cannot serve as a surrogate for a coinless call rate without the removal of coin-specific costs. Indeed, the D.C. Circuit's ruling plainly requires that the rate for coinless calls be lower than the local coin rate. The Commission cannot allow these parties to inject arguments into this proceeding which are inconsistent with their earlier positions, particularly when these parties failed to argue upon reconsideration against the use of the local coin rate as a baseline for default compensation.

III. The Commission Erred in Setting the Market Rate for Local Coin Calls At $.35.

If the Commission decides to establish the rate for coinless payphone calls by subtracting the cost of coin calls from the deregulated local coin rate, it must set the deregulated coin rate no higher than $.25. As several commenters noted, in setting the market rate for a local coin call at $.35, the Commission failed to make a reasoned assessment of the market for local coin rates.[21] In its *Report and Order*, the Commission noted that four of the five states that had deregulated the local coin rate (Iowa, Nebraska, North Dakota, and Wyoming) had a rate for local coin calls of $.35.[22] This analysis is flawed in several respects. First, these four states hardly constitute a representative sample of the market for payphones throughout the country. Payphones in these four states account for only 2%

Reconsideration, 11 FCC Rcd, at 21249-21251, ¶¶ 33-37. WPTA argued that the default compensation rate should be set higher using a *marginal cost-based* approach, while the Inmate Coalition and Invision argued that a special per-call compensation rate was warranted for *inmate payphone providers*. The other petitioners noted above in this footnote argued *against* the use of a $0.35 default coinless call compensation rate based upon the local coin rate.

[21] *See* Comments of MIDCOM, at 5; Comments of RCN, at 3.

[22] *Report and Order*, 11 FCC Rcd at 20578, ¶ 72.

of the total number of payphones in service. In addition, the rural nature of these four states increases the possibility that the payphones in these states are subject to the locational monopolies that keep payphone rates above market--whether or not the payphone rate is subject to regulation.

Moreover, in setting the so-called market rate for local coin calls at the highest rate that has resulted from deregulation, the Commission is acting contrary to the market based theory it has put forth. The theory behind a market based rate and section 276 of the 1996 Act is to promote competition and the widespread deployment of payphones to the benefit of consumers.[23] Pursuant to that logic, a market based rate in which there is competition, should drive the costs of payphone calls down, yet the Commission has set what it calls a market based rate at a level $.10 higher than the most common regulated rate for local coin calls throughout the country.[24] This conclusion is plainly the result of the unrepresentative sample the Commission has used.

For example, the proceeding before the Massachusetts DPUC regarding NYNEX's payphone rates illustrates that the market rate for local coin calls should be no higher than $.25. As AT&T and Sprint noted, in that proceeding NYNEX showed that the costs of carrying a local coin call is less than $.17 and NYNEX requested a local coin rate of $.25.[25] Excel and Telco submit that Massachusetts is a state more representative of the provision of payphone service throughout the United States than the sample used by the Commission. Unlike the four states upon which the

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[23] 47 U.S.C. § 276(b)(1) (1996) ("In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public . . . .")

[24] *Report and Order*, 11 FCC Rcd at 20556, ¶ 28 (recognizing that the nationwide predominant rate is $.25.)

[25] Comments of AT&T, at 12; Comments of Sprint, at 8-9.

Commission relied, Massachusetts contains a busy urban area in addition to more remote rural areas. Moreover, because NYNEX was attempting to raise its rates in this proceeding, it had no incentive to understate its costs. Accordingly, if the Commission is going to base the coinless rate on a market-based local coin rate, the highest possible market rate for local coin calls would be $.25. However, under a market-based theory, competition should drive the rate for local coin service below even $.25. In calculating the rate for coinless calls, the Commission must subtract all coin-related costs from this lower rate.

IV. The Interim Compensation Plan Should Be Abandoned

Excel and Telco agree with many commenters who stated that in light of the D.C. Circuit's finding that the interim compensation plan was arbitrary and capricious and the impending date to implement per-call compensation, the Commission should simply abandon its interim compensation plan.[26] At this late date, attempting to reassess the contributions of all LECs and IXCs would be extremely burdensome and unnecessary. Moreover, in assessing contributions for the prior year it will be very difficult to ascertain an appropriate measure of compensation and the Commission could likely require compensation based on a different, yet still arbitrary standard. Indeed, the statute requires the Commission to promulgate rules for a per-call compensation plan and it is obvious that no per-call plan could be established for the prior year.

Accordingly, Excel and Telco submit that it would be more efficient for the Commission to focus its efforts on developing the appropriate rate for per-call compensation and to abandon the interim plan. Such a decision would be completely consistent with Section 276 of 1996 Act. Section

[26] Comments of WorldCom, at 5-6; Comments of Sprint, at 12; Comments of CompTel, at 14; Comments of Cable & Wireless, at 11.

276 only required the Commission to *fashion rules* for per-call compensation within nine months of the enactment of the 1996 Act.[27] As a matter of law, the Commission is therefore free to abandon the interim compensation plan and begin compensation on October 7, 1997, which is when per-call compensation is scheduled to commence.

However, if the Commission decides to revise an interim compensation plan for the prior year, the commenters (including the RBOC Coalition) have unanimously supported that all LECs and small IXCs must be included in any such compensation plan. As the D.C. Circuit noted in its opinion, "[a]dministrative convenience cannot possibly justify an interim plan that exempts all but large IXCs from paying for the costs of services received."[28] Indeed, even the Coalition concedes that there is no principled reason to exclude LECs from this obligation. The Coalition states, "to the extent LECs carry intraLATA subscriber 800 or intraLATA access code toll traffic from payphones and for which the market otherwise cannot provide compensation, LECs should make a fairly calculated contribution as well."[29]

In terms of calculating interim compensation, Excel and Telco suggested in its initial comments to base compensation obligations on total toll revenues, but to allow carriers who desire, to track and pay on a per-call basis.[30]

Excel and Telco, however, would also be amenable to a starting point calculation that is more directly based on revenue received from a payphone. For instance, Sprint suggested in its comments

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27 47 U.S.C. § 276(b)(1)

28 *Illinois Public Telecomm. Ass'n*, 117 F.3d at 565.

29 Comments of the Coalition, at 34-35.

30 Joint Comments of Excel and Telco, at 6.

to base compensation obligations on the number of compensable dial-around and subscriber 800 calls each carrier handles for the calendar month of November 1997--the first entire month for which per call compensation is required.[31] Similarly, MIDCOM suggested basing compensation on the revenue each carrier earns from toll-free and access code calls placed from payphones.[32] Excel and Telco would support either of these methods as the starting point for determining each carrier's share of interim compensation, as long as the Commission allows carriers who are technically able, the opportunity to track and pay on a per-call basis during the interim year if the carrier so desires. Allowing per-call compensation is the method most consistent with section 276, which requires the commission to establish a "per-call compensation plan." Therefore, if the Commission decides to establish an interim compensation plan, it should permit--but not require--carriers such as Telco to pay interim compensation on a per-call basis.[33]

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[31] Comments of Sprint, at 13.

[32] Comments of MIDCOM, at 9.

[33] *See Petition of Telco Communications Group, Inc. for Waiver of Section 64.1301 of the Commission's Rules*, CC Docket No. 96-128 (filed March 24, 1997).

V. CONCLUSION

For the foregoing reasons, Excel and Telco respectfully request that the Commission act in accordance with the recommendations provided herein.

Respectfully submitted,

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202851.1

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I, Jolanda Tedford, hereby certify that a copy of the foregoing **Joint Reply Comments of Telco Communications Group, Inc. and Excel Telecommunications, CC Docket No. 96-128** was sent to each of the following parties by hand delivery (denoted with asterisk) and regular mail on this 9th, day of September, 1997.

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